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# Some Problems Regarding Price in the Louisiana Law of Sales

PAUL M. HEBERT\* AND CARLOS E. LAZARUS†

## LOUISIANA CIVIL CODE OF 1870:

Art. 2439. The contract of sale is an agreement by which one gives a thing for a *price in current money*, and the other gives the price in order to have the thing itself.

Art. 2456. The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object *and for the price thereof*, although the object has not yet been delivered *nor the price paid*.

Art. 2464. The *price of the sale* must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

Art. 2465. The *price*, however, may be left to the arbitration of a third person; but if such person can not, or be unwilling to make the estimation, there exists no sale. (*Italics supplied.*)

## INTRODUCTION

The consensual contract of sale of the civil law first made its appearance in the Roman law<sup>1</sup> and, although there is a divergence of opinion as to its source, it is clear that it "began by being an exchange in which the parties carried out their respective parts of

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1. G. 3.135, 136 [1 Scott, *The Civil Law* (1932) 169]; I. 3.22.1 [2 Scott, *op cit. supra*, at 120]; Buckland, *A Manual of Roman Private Law* (2 ed. 1939) 278, § 107.

the bargain simultaneously and left no obligations outstanding."<sup>2</sup> This contract was known as *emptio venditio* and was binding on the parties as soon as there was a definite agreement as to the thing and the price.<sup>3</sup> Since it was a consensual contract, no particular form was necessary and consent could be shown in any manner, except when the parties had agreed that the contract should be reduced to writing, in which case there was no binding agreement until the instrument was completed.<sup>4</sup> Thus, three things were necessary for the conclusion of the contract: the thing, the price, and the consent.

That a price in money was necessary to constitute a contract of sale was very early decided. In the Institutes of Gaius, reference is made to a controversy as to whether exchange was or was not a species of sale.<sup>5</sup> Paulus was of the opinion that there could not be a sale unless there was a price in money, for otherwise it would be impossible to determine which party should be considered the buyer and which the seller.<sup>6</sup>

Furthermore, it was necessary that the price be fixed,<sup>7</sup> for there could not be a sale without a price. As a corollary, this required that the price be expressed with certainty.<sup>8</sup> However, by virtue of the maxim "*id certum est quod certum reddi potest*" the price was said to be certain, although not actually expressed in a stated sum of money, if what was really promised was susceptible of ascertainment, for example, if a thing was sold at the current market price.<sup>9</sup>

There was considerable controversy as to the validity of a sale in which the price was left to be fixed by a third person. Justinian ruled that

"The contract shall stand under the following conditions, namely, that if he who is mentioned shall establish the price it shall be paid in every instance in accordance with his estimate, and the property shall be delivered so that the sale shall

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2. Jolowicz, *Historical Introduction to the Study of Roman Law* (1932) 298.

3. G. 3.139 [1 Scott, op. cit. supra note 1, at 170]; I. 3.23.pr. [2 Scott, op. cit. supra note 1, at 120].

4. I.3.23.pr. [2 Scott, op. cit. supra note 1, at 121]; Buckland, op. cit. supra note 1, at 278, § 107.

5. G.3.141 [1 Scott, op. cit. supra note 1, at 170]. See also I.3.23.2 [2 Scott, op. cit. supra note 1, at 121, 122].

6. D.18.1.1.1 [5 Scott, op. cit. supra note 1, at 3, 4].

7. I.3.23.1 [2 Scott, op. cit. supra note 1, at 121].

8. Ibid.; G.3.140 [1 Scott, op. cit. supra note 1, at 170].

9. Buckland, op. cit. supra note 1, at 281, § 108; Moyle, *The Contract of Sale in the Civil Law* (1892) 68.

be accomplished; . . . but if the party mentioned is either unwilling or unable to fix the price, then the sale shall be void, because no price was determined upon. . . ."<sup>10</sup>

Roman law exacted an additional condition regarding the price—that it should be serious; otherwise, the price was considered derisive and the transaction regarded as a gift.<sup>11</sup> But a distinction was made between a derisive price and an inadequate price. To be a valid sale, the price did not need to be adequate; the parties were at perfect liberty to make their own bargains and the mere fact that the price did not represent the equivalent of the thing sold did not invalidate the transaction.<sup>12</sup> In cases in which land was sold, however, an exception was made by the rule of *laesio enormis* which provided for the rescission of the contract by the seller if the land were sold for less than one-half of its fair value.<sup>13</sup>

It is significant that the modern civil law of sales, as embodied in the Code Napoleon and in its offspring the Louisiana Civil Code, still adheres to these briefly enumerated basic principles of Roman law. The civil law of sales is broad in scope, including not merely sales of goods, wares and merchandise, but also embracing sales of immovables and incorporeal rights. Consequently, the principles governing price, reflected in the articles of the Louisiana Civil Code set forth above, take on added importance in relation to the broader scope of the sales transaction. It has been well stated by Professor Llewellyn that price, viewed from an economic standpoint, "is the heart of the sales contract."<sup>14</sup> The traditional emphasis upon the importance of price and its certainty, flowing from the Roman law to the modern civil codes, illustrates that price is equally important from the legal point of view since, in accordance with the definition, there cannot be a sale without a price, although contracts of a different nature may result from agreements which fall short of the standards required for the sale transaction. Accordingly, it is the purpose of this article to discuss some of the problems of price in the Louisiana law of sale with a particular view to testing whether the legal rules are elas-

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10. I.3.23.1 [2 Scott, op. cit. supra note 1, at 121].

11. D.18.1.36.pr. [5 Scott, op. cit. supra note 1, at 13].

12. D.18.1.38.pr. [5 Scott, op. cit. supra note 1, at 13]; Buckland, op. cit. supra note 1, at 280, § 108.

13. C.4.44.2 [13 Scott, op. cit. supra note 1, at 100]; Buckland, op. cit. supra note 1, at 281, § 108.

14. Llewellyn, Cases and Materials on Sales (1930) 1.

tic enough to meet the exigencies of modern economy and business practices.<sup>15</sup>

#### A. PRICE PAYABLE IN MONEY

The feature that distinguishes the contract of sale from all other contracts for the transfer of property is the element of price which must be a sum of money.<sup>16</sup> It is fundamental that if the consideration for the transfer of property is anything but money, the transaction is not a sale but a contract of a different kind according to the nature of the consideration. If other property is given, the transaction is an exchange;<sup>17</sup> if the transfer is made for a sum which is due and owing, it becomes a dation en paiement;<sup>18</sup> if it is given in payment for services rendered or to be rendered, it is considered a remunerative donation.<sup>19</sup>

The importance of these differences cannot be overemphasized since not only the rights and liabilities of the parties, but also the formalities necessary for the validity of such contracts, depend entirely upon the nature of each particular agreement. Thus, a "sale" for which no price is expressed or given will be upheld as a donation only when the act is in proper form and the parties are not respectively incapable of giving or receiving by donation.<sup>20</sup> Similarly, it is apparently necessary to determine

15. In the following discussion no distinction will be made between a contract to sell (whereby the seller promises to sell to the buyer in the future) and a contract of sale (in which the property in the thing sold is presently transferred to the buyer) since both contracts are governed by the same rules.

16. Arts. 2456, 2464, La. Civil Code of 1870; 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1932) 28, n° 35; 19 Baudry-Lacantinerie et Saignat, *Traité Théorique et Pratique de Droit Civil, De la Vente et de l'Echange* (3 ed. 1906) 124, n° 127. At common law, payment may be made in commodities as well as in money. Uniform Sales Act § 9(2); *Selznick v. Holmes Pittsburgh Automobile Co.*, 275 Pa. 1, 118 Atl. 553 (1922). But even at common law, the contract is not a sale if the consideration therefor consists of services to be rendered. *Haag v. Klee*, 162 Misc. 250, 293 N.Y. Supp. 266 (1936).

17. Art. 2660, La. Civil Code of 1870.

18. Art. 2655, La. Civil Code of 1870.

19. Art. 1523, La. Civil Code of 1870. *Ackerman v. Lerner*, 116 La. 101, 40 So. 581 (1906); *Robinson v. Guedry*, 181 So. 882 (La. App. 1938). Article 1523 of the Louisiana Civil Code, distinguishing between gratuitous donations and the so-called remunerative and onerous donations, has no counterpart in the Code Napoleon. Whatever the nature of these contracts, it is clear that they are not real donations when the purpose of the transfer is to recompense the transferee for services which he has rendered. See Arts. 1524, 1525, La. Civil Code of 1870; 10 Baudry-Lacantinerie et Colin, *Traité Théorique et Pratique de Droit Civil, 1 Des Donations Entre Vifs et Testaments* (3 ed. 1905) 515, nos 1135, 1136. Accordingly, it is not only misleading but erroneous to refer to such transfers as donations for such transactions are in effect commutative contracts of a different nature. But the term "remunerative or onerous donations" is widely used both here and in France.

20. *Holmes v. Patterson*, 5 Mart. (O.S.) 393 (La. 1818); *D'Orgenoy v. Droz*, 13 La. 382 (1839). See also *Landry v. Landry*, 40 La. Ann. 229, 3 So. 728 (1888).

whether a contract is a remunerative donation or a dation en paiement; in the latter there must be a fixed price,<sup>21</sup> but this requirement has been held unnecessary for the validity of a remunerative donation.<sup>22</sup> One important difference between a sale and a dation en paiement is that the latter is perfect only upon delivery,<sup>23</sup> from which it follows that the risk of the thing given in payment never falls upon the creditor before delivery, unless he has delayed beyond a reasonable time to obtain it.<sup>24</sup>

Our courts do not seem to have been called upon to determine the true nature of the contracts involved in the cases presented, perhaps because it has frequently been unnecessary for the decision to determine whether the transactions were real sales.<sup>25</sup> There has been dictum to the effect that a pre-existing debt for services rendered will support a sale if the parties fix the amount due and agree upon this as the price;<sup>26</sup> and in at least one instance the supreme court upheld a sale in which the actual "price" was the

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21. Art. 2659, La. Civil Code of 1870; *Kleinpeter v. Harrigan*, 21 La. Ann. 196 (1869); *Pulford v. Dimmick*, 107 La. 403, 31 So. 879 (1902).

22. *Hearsey v. Craig*, 126 La. 824, 53 So. 17 (1910); *Robinson v. Guedry*, 181 So. 882 (La. App. 1938). In *Robinson v. Guedry* (181 So. at 884), the court stated: "Council for plaintiff, however, say that in a dation en paiement, as in a contract of sale, it is essential that the price of the thing given be fixed and that since in the act of donation the value of the services are not fixed, it is void because a remunerative donation is, in effect, a dation en paiement. RCC Arts. 2656, 2658 and 2659. The fallacy of this argument is that while the principle relied upon has application to sales and to a dation en paiement, it does not apply to remunerative donations."

It must be pointed out in this connection that the so-called remunerative donation is in reality a donation when the services rendered are not appreciable in money. In order to become a remunerative donation in the generally accepted meaning of the term, it is essential that the services rendered be susceptible of a pecuniary evaluation for, otherwise, it would be impossible to determine, according to the provisions of Articles 2524, 2525 of the Civil Code, when the transfer comes within the definition. As such, then, the transfer is more in the nature of a dation en paiement than a real donation. See 10 *Baudry-Lacantinerie et Colin*, op. cit. supra note 19, at 515, n° 1135. In fact, our supreme court has consistently held that a remunerative donation constitutes in effect a dation en paiement. *Succession of Henry*, 158 La. 516, 104 So. 310 (1925). Such being the case, the soundness of the decision of the court in the *Guedry* case is questionable.

23. Art. 2656, La. Civil Code of 1870.

24. Art. 2657, La. Civil Code of 1870.

25. *Levert v. Hebert*, 51 La. Ann. 221, 25 So. 118 (1899); *Pulford v. Dimmick*, 107 La. 403, 31 So. 879 (1902); *Citizens Bank & Trust Co. v. Willis*, 183 La. 127, 162 So. 822 (1935). Cf. *Landry v. Landry*, 40 La. Ann. 229, 231, 3 So. 728, 729 (1882), in which the court stated:

"For the purposes of the decree which we propose to render in the cause, it is perhaps immaterial to specifically define the contract which is herein assailed. But as precision is always desirable in announcing judicial conclusions, we feel impelled to hold that under the evidence the true nature of the contract was an onerous donation inter vivos. . ."

26. *Pulford v. Dimmick*, 107 La. 403, 31 So. 879 (1902).

obligation of the purchaser to support the seller during his lifetime.<sup>27</sup>

The failure of the decisions to distinguish clearly between sales and other contracts is most unfortunate for, as already indicated, the ultimate rights of the parties usually depend not upon whether there is a binding contract but upon the true character thereof.

#### *Price in Commodities Having Current Value*

If the price is expressed in terms of commodities having a ready market value appreciable in money, the contract should be an exchange and not a sale, regardless of what the parties have chosen to call it. The French commentators, despite the absence of a "money requirement" in the articles of the French Civil Code,<sup>28</sup> are almost unanimously agreed that a contract is not a sale unless a price in money is paid or agreed upon.<sup>29</sup> Marcadé and Duranton, however, are of the opinion that it suffices if the price be expressed in terms of any commodity the value of which is readily estimated in money, as for example, if the price be expressed in terms of corn, wheat or any other commodity listed in the stock exchanges.<sup>30</sup> However, the majority of the authors point out that such a rule would be unworkable because whenever one of the objects exchanged has acquired a given evaluation,<sup>31</sup> it would then be necessary to label a transaction a sale even though it was in reality an exchange. By virtue of the strict requirement of Article 2439, the prevailing French rule would undoubtedly be followed in Louisiana.

#### *Price in the Form of Services*

Under the provisions of the French Civil Code a contract whereby a person transfers a thing to another on condition that the latter should support the former during his life is not regarded as a sale because no price in money is stipulated, nor as an exchange because there has not been a reciprocal transfer of "things." Such a contract is classed under the category of "in-

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27. *Citizens Bank & Trust Co. v. Willis*, 183 La. 127, 162 So. 822 (1935).

28. Art. 1591, French Civil Code: "*Le prix doit être déterminé et désigné par les parties.*"

29. 5 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1907) 13, § 349 c; 19 Baudry-Lacantinerie et Saignat, *op. cit. supra* note 16, at 124-126, nos 127, 128; 10 Huc, *Commentaire Théorique et Pratique du Code Civil* (1897) 54, n° 34; 24 Laurent, *Principes de Droit Civil Français* (1877) 77-79, nos 68-70; 10 Planiol et Ripert, *op. cit. supra* note 16, at 28, n° 35.

30. 16 Duranton, *Cours de Droit Français* (3 ed. 1834) 154, n° 119; 6 Marcadé, *Explication Théorique et Pratique du Code Civil* (7 ed. 1875) 182 et seq.

31. 19 Baudry-Lacantinerie et Saignat, *op. cit. supra* note 16, at 125, n° 128.

nominate contracts" in which the acquirer's obligation is simply an obligation to do.<sup>32</sup> In Louisiana such transfers are generally held to constitute remunerative or onerous donations.<sup>33</sup>

#### *Price in the Form of Annuities*

Although the price must necessarily be a sum of money, it is generally agreed by the French commentators that if the price be paid in the form of an annuity it will satisfy the requirements.<sup>34</sup> The consideration for the transfer is still money, though it is to be paid out of the revenues produced from the thing itself. Such transactions have been upheld as valid sales in Louisiana.<sup>35</sup>

#### *Price Partly in Money and Partly in Some Other Consideration*

When the consideration for the transfer consists of both a price in money and something else, the determination of the character of the contract, according to the French jurisprudence, depends upon the nature of the predominant factor; doubts are resolved in favor of a sale, because it is the contract most in use.<sup>36</sup> Similarly, if the consideration for the transfer is either a price or a thing, the French law makes determination of the nature of the contract depend upon whether the transferor accepted the one or the other.<sup>37</sup>

Once the parties have agreed as to the thing and as to a price in money, the contract is a sale. If the purchaser is afterwards unable to pay and he gives a thing in payment of the price, this fact does not change the nature of the contract, for the thing is then given as a dation en paiement for the obligation of the price.<sup>38</sup>

#### *Innominate Contracts*

Some contracts transfer the ownership of things; yet because

32. See authorities cited in note 29, supra. See also 5 Troplong, *Le Droit Civil Explique* (5 ed. 1856) 192, n° 148.

33. *Landry v. Landry*, 40 La. Ann. 229, 3 So. 728 (1888). See note 4, supra.

34. See authorities in note 29, supra.

35. *Rudolf v. Gerdy*, 121 La. 477, 46 So. 598 (1908).

36. 16 Duranton, op. cit. supra note 30, at 153, n° 18; 1 Guillouard, *Traité de la Vente & de l'Echange* (1890) 112, n° 94(I); 10 Huc, op. cit. supra note 29, at 55, n° 34.

By virtue of Article 1446 of the Spanish Civil Code, if the price of the sale should consist partly in money and partly in some other thing, the nature of the contract is primarily determined by the manifest intention of the parties; failing this, the contract will be considered an exchange or barter if the value of the thing given exceeds that of the money, and as a sale, if the contrary is shown. 10 Manresa, *Comentarios al Código Civil Espanol* (4 ed. 1931) 13 et seq. Identical provisions are found in the Philippine Code, Art. 1446.

37. 6 Marcadé, op. cit. supra note 30, at 185.

38. Id. at 184; 5 Troplong, op. cit. supra note 32, at 191, 192, n° 147.



of their peculiar nature, they cannot be classed under any of the categories of contracts known to the law. These contracts are nevertheless valid and enforceable. Reference has already been made to such innominate contracts in the French law regarding a transfer of property in return for the obligation of the transferee to support the transferor during his life.<sup>39</sup>

Of particular importance in this connection is a contract which is not strictly a contract of sale because of the absence of a fixed price, but is nevertheless said to transfer the ownership of a thing "sold" and to subject the "purchaser" to the payment of a specified price.<sup>40</sup> In the case of *H. T. Cottam & Company v. Moises*<sup>41</sup> the plaintiffs "sold" and delivered to the defendant a lot of merchandise which the defendant refused to accept. Plaintiffs resold the merchandise at a loss and then sued the defendant for the difference in price. The defendant contended that though he had ordered the merchandise no fixed price had been agreed upon, and that he was not liable because there was no sale. The court held: "It is immaterial that no price was agreed upon. When goods are ordered from a merchant without any stipulation as to price, he has a right to recover their market value."<sup>42</sup>

This principle finds ample support in Article 1816 of the Civil Code<sup>43</sup> and it is clear that the liability of the "purchaser" in such cases rests on a quasi contractual basis. The court relied for its decision on the case of *Helluin v. Minor* in which this principle is announced by way of dictum. In that case, an assignment of a pre-emption right to land was made to the defendant. The assignment had been made in accordance with an act of Congress regulating such transfers, and the instrument evidencing the transfer contained the following:

"For value received, we . . . assign, transfer and set over unto Van Perkins Winder . . . and Wm. J. Minor . . . all of our right, title, claim and demand, to a tract of land purchased by us . . . situated in the district of lands subject to sale at New Orleans, and request that a patent may be issued to the said Van Perkins Winder and Wm. J. Minor. . . ."<sup>44</sup>

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39. See authorities cited note 32, *supra*.

40. *H. T. Cottam & Co. v. Moises*, 149 La. 305, 88 So. 916 (1921); *Union Tank Car Co. v. Louisiana Oil Refining Corp.*, 178 La. 940, 152 So. 571 (1934). See also *Helluin v. Minor*, 12 La. Ann. 124 (1857).

41. 149 La. 305, 88 So. 916 (1921).

42. 149 La. at 307, 88 So. at 917.

43. Art. 1816, La. Civil Code of 1870, states in part: "To receive goods from a merchant without any express promise, and to use them, implies a contract to pay the value."

44. *Helluin v. Minor*, 12 La. Ann. 124, 125-126 (1857).

The plaintiff claimed that the title of the defendant assignee was invalid because the act of transfer was void for want of a fixed price. In the light of the foregoing, this contention was apparently correct but the court made the following observation:

"There cannot be any doubt that our courts would consider the instrument invalid as a donation, and it may not be (technically considered) a sale under the Civil Code; but it does not necessarily follow that the contract itself, after its execution, is to be considered as void because it cannot be classed under the contract of sale."

"An illustration of this occurs where a planter or a head of a family sends his servant for, or orders himself in person, without agreeing upon the price, such articles of merchandise at a store where he has credit as he may need. The dealer charges the goods upon his books at such prices as he deems just. Here no price is agreed upon, and at most it can only be implied that the planter will pay a price equal to the value of the goods at the end of the year or period of credit. Now, although there has been no fixed price agreed upon, the planter, after having consumed the goods or injured the same by wear, would not be listened to for a moment in a court of justice, with a plea that in the delivery to him of each article there was no contract of sale, because there was no price agreed upon as required by Article 2439 of the Civil Code. The court would at once conclude that the property in the goods, *by a contract analogous to the contract of sale, had vested in one party, and the value of the goods was due to the other party*, and that if the contract was not a sale, it was an innominal contract, not the less obligatory." (Italics supplied.)<sup>45</sup>

But this rule had no application whatever to the factual situation presented in the case as it will appear from the court's further statement:

"Now, as this instrument was made to conform to the instructions of the department at Washington, where it was to produce its principal effect, *we think we may safely infer from the language used 'for value received,' that the price was agreed upon and paid*, or its equivalent given in exchange." (Italics supplied.)<sup>46</sup>

The case rests, therefore, not on the doctrine announced, but on

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45. Ibid.

46. Id. at 126.

the conclusion that, since the contract was made in accordance with instructions from Washington and since it was there that its principal effects were to be had, the price should be presumed to have been agreed upon and paid.<sup>47</sup>

Another illustration of an innominate contract is found in the case of *Union Tank Car Company v. Louisiana Oil Refining Corporation*.<sup>48</sup> A lease provided that the lessee would have the right to all the buildings erected on the premises and to remove them at the expiration thereof. The lessee also had the right to abandon the buildings in which event the lessor agreed to reimburse him in "an amount equal to the value thereof, obsolescence and depreciation both considered." It was contended that this part of the agreement was meant to be a sale and, as such, it was void for want of a fixed price. The court held:

"But to this we cannot accede. Ordinarily it is true that any transfer of property from one to another for a consideration in money is a sale, because generally the parties have first agreed on a fixed price. But there are many instances in which the ownership of property passes from one to another for a consideration payable in money but not fixed or agreed upon by the parties beforehand."

"Hence our conclusion is that when the Code provides that in a sale the price must be certain it speaks only of the simple contract of sale and not of a transfer of property as a mere incident to some other contract, as a lease. And in this case it was a mere incident of the lease between the parties that the lessor bound himself to reimburse the lessee at the end of the lease for such buildings, trackage and machinery as the lessee might elect not to take away."<sup>49</sup>

The mere fact, therefore, that a contract is not technically a sale or an exchange or any other recognized contract, because of the absence of some essential element, does not make it invalid; such contract will be enforceable under the general rules of obligations, if it is found that a valid agreement has been entered into between the parties. The difference is that since the contract is not a sale the peculiar principles of law governing sale are not binding on the parties.

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47. Cf. *Kleinpeter v. Harrigan*, 21 La. Ann. 196 (1869).

48. 178 La. 940, 152 So. 571 (1934).

49. 178 La. at 943, 945, 152 So. at 572, 573.

## B. CERTAINTY AS TO PRICE

An important question is whether the price must be stated in the contract with definite certainty. The provision as to certainty contained in Article 2464 of the Civil Code means that the price must be fixed and determined by the parties,<sup>50</sup> but the codal provisions do not require that the price be stated in the act at all. It is sufficient for the validity of the transaction that the parties have agreed to a fixed and determinate price.<sup>51</sup> Thus in a sale "for a valuable consideration" the contract is valid and binding if the parties can show the true consideration for the transfer.<sup>52</sup> In the majority of cases, however, such showing can only be made by parol testimony and thus the problem as to when parol evidence is admissible becomes one of primary importance.

*Parol Evidence to Prove Real Price*

Article 2276 of the Civil Code provides:

"Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."

Article 1900 of the Civil Code provides:

"If the cause expressed in the consideration [contract] should be one that does not exist, yet the contract can not be invalidated, if the party can show the existence of a true and sufficient consideration."<sup>53</sup>

Under this last article the courts have generally admitted oral testimony to show actual consideration (1) when the instrument evidencing the transaction is silent;<sup>54</sup> (2) when the consideration stated in the writing is insufficient in itself to support the contract;<sup>55</sup> (3) when the consideration stated is proved to be simulated, that is, when consideration other than that stated is the true cause for the contract;<sup>56</sup> and (4) to show a consideration which will support a contract other than a contract of sale.<sup>57</sup>

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50. Art. 2464, La. Civil Code of 1870.

51. Walker v. Fort, 3 La. 535 (1832); Pulford v. Dimmick, 107 La. 403, 31 So. 879 (1902). See also Moore v. Pitre, 149 La. 910, 90 So. 252 (1921); Breeden v. Breeden, 147 So. 757 (La. App. 1933).

52. Breeden v. Breeden, 147 So. 757 (La. App. 1933).

53. Arts. 1900, 2276, La. Civil Code of 1870.

54. Breeden v. Breeden, 147 So. 757 (La. App. 1933).

55. Moore v. Pitre, 149 La. 910, 90 So. 252 (1921); Simoneaux v. Lebermuth & Israel Planting Co., Ltd., 155 La. 689, 99 So. 531 (1924).

56. Brown v. Brown, 30 La. Ann. 966 (1878); Jackson v. Miller, 32 La. Ann. 432 (1880); Landry v. Landry, 40 La. Ann. 229, 3 So. 728 (1882); Citizens Bank & Trust Co. v. Willis, 183 La. 127, 162 So. 822 (1935); Ryals v. Ryals, 199 So. 481 (La. App. 1940). Cf. Chaffe v. Scheen, 34 La. Ann. 684 (1882).

57. Landry v. Landry, 40 La. Ann. 229, 3 So. 728 (1882); Simoneaux v.

Some of the decisions are to the effect that it is the necessary consequence of Article 1900 that the true cause of a contract "may be shown by legal evidence, oral or written, and that the evidence adduced for that purpose can never be considered as contradicting the act."<sup>58</sup> On the other hand, it has been stated with equal force that the provisions of Article 1900 were never intended to "abrogate the rule by which parol evidence is inadmissible to contradict or vary written acts."<sup>59</sup> The broadness of these statements has given rise to much confusion, with the result that the question as to the proper limitation on the scope of Article 1900 has become a matter of much difficulty.<sup>60</sup>

The French jurisprudence is based on general principles of law similar to our own,<sup>61</sup> and it admits parol testimony to show

Lebermuth & Israel Planting Co., Ltd., 155 La. 689, 99 So. 531 (1924). See also *Holmes v. Patterson*, 5 Mart. (O.S.) 693 (La. 1818); *D'Orgenoy v. Droz*, 13 La. 382 (1839); *Nofsinger v. Hinchee*, 199 So. 597 (La. App. 1941). Cf. *Loranger v. Citizens' Nat. Bank*, 162 La. 1054, 111 So. 418 (1927); *Whittington v. Heirs of Pegues*, 165 La. 151, 115 So. 441 (1928).

58. See *Delabigarre v. Second Municipality of New Orleans*, 3 La. Ann. 230, 235 (1848). See also *Jackson v. Miller*, 32 La. Ann. 432 (1880); *Landry v. Landry*, 40 La. Ann. 229, 3 So. 728 (1882).

59. *Clark v. Hedden*, 109 La. 147, 154, 33 So. 116, 119 (1902).

60. In numerous instances the decisions have distinguished the cases in which parol evidence was admitted from those in which the evidence was held inadmissible, but the bases for the distinction have not been made very clear. See *Robinson v. Britton*, 137 La. 863, 69 So. 282 (1915); *Loranger v. Citizens' Nat. Bank*, 162 La. 1054, 111 So. 418 (1927); *Whittington v. Heirs of Pegues*, 165 La. 151, 115 So. 441 (1928); *Citizens Bank & Trust Co. v. Willis*, 183 La. 127, 162 So. 822 (1935); *Barre v. Hunter*, 181 So. 674 (La. App. 1938); *Wainwright v. Gilham*, 188 So. 434 (La. App. 1939); *Grimm v. Pugh*, 197 So. 641 (La. App. 1940); *Ryals v. Ryals*, 199 So. 481 (La. App. 1940).

Perhaps the best reason for the admissibility of parol evidence under Article 1900 of the Civil Code is that given by Chief Justice O'Niell in *Cleveland v. Westmoreland*, 191 La. 863, 873, 186 So. 593, 596 (1939), as follows:

"According to article 1900 of the Civil Code, if the cause of consideration stated in the contract is not the true cause or consideration for which the contract was made, the contract is yet valid 'if the party [*against whom a want of consideration is pleaded*] can show the existence of a true and sufficient consideration.'" (Italics supplied.)

In *Chaffe v. Scheen*, 34 La. Ann. 684 (1882), the court limited the operation of Article 1900 to cases where the consideration sought to be introduced was such as was contemplated by the parties at the time of execution of the act but which was misdescribed therein.

61. Art. 2276, La. Civil Code of 1870, is based on the provisions of Art. 1341, French Civil Code. Although Article 1900 of the Louisiana Civil Code has no counterpart in the Code Napoleon, it is evident that it had its origin in well recognized principles of French jurisprudence. *Toullier* states:

"Although an obligation can not exist without an honest and valid cause it is not necessary, under penalty of nullity, that such cause be expressed. The Roman laws ordained that failure to express a cause in a writing required the person for whose benefit it had been made, to prove that there was a real and legitimate cause.

"The opinions of the French authors were so divided on this point, that the court did not always decide in the same manner. However, the jurisprudence seemed to adopt the opinion of those who thought that failure to express the cause did not render the obligation null. . . .

"This wise opinion was made into law by article 1132, which provides that

the existence of consideration other than that expressed in the written act only when the writing itself has been disproved by competent evidence. In other words, the person attacking the contract as invalid must show by competent evidence<sup>62</sup> that there was no consideration. Once the non-existence of the consideration has been proved, the other party may then show the existence of other legal and sufficient cause to uphold the contract.<sup>63</sup>

The party against whom want of consideration is pleaded, although the writing does state the existence of the cause, has thus two alternatives: (1) he may object to the evidence proffered (unless it is otherwise competent) and thereby prevent the contradiction of the writing, or (2) he may permit the evidence to be introduced (if not otherwise legally admissible) and then, admitting the non-existence or simulation of the consideration, show by any other evidence the true consideration for the contract.<sup>64</sup>

In Louisiana no difficulty is presented when the contract of sale is silent as to price or when the price therein stated is merely nominal. It is generally admitted that in such cases parol evidence is admissible to show the existence of serious price.<sup>65</sup> In the first instance, the cause of the contract is presumed<sup>66</sup> and the evidence

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the obligation is none the less valid, although the cause has not been expressed.

"Since it is not necessary to express in the act the cause of the obligation, it must be concluded that the obligation is valid although the cause expressed is false, provided that there exists another legitimate cause. This is a point decided in several cases by the court of cassation.

*"But if it is proved that the cause expressed is false, the creditor must then prove that the obligation has another honest and legitimate cause. . . ."* (Italics supplied.) 3 Toullier, *Le Droit Civil Français* (dernière ed. 1833) 381, 382, nos 175-177.

See also 12 Baudry-Lacantinerie et Barde, *Traité Théorique et Pratique de Droit Civil*, 1 Des Obligations (3 ed. 1906) 341, no 308, and authorities therein cited.

62. "Competent evidence" is understood to be any evidence admissible under the parol evidence rule, such as other written instruments, or even oral evidence not objected to at the time. See Comment (1941) 3 LOUISIANA LAW REVIEW 427, 431.

63. *Id.* at 436.

64. When proof that the consideration stated in the writing did not actually exist, the defendant has the burden of proving the existence of another cause, and this proof may be made by any type of evidence. Cass. 5 décembre 1900, *Sirey* 1901.1.229; 2 Planiol, *Traité Élémentaire de Droit Civil* (2 ed. 1926) 429, no 1206.

65. *Klein v. Dinkgrave*, 4 La. Ann. 540 (1849); *Read v. Hewitt*, 120 La. 288, 45 So. 143 (1907); *Breeden v. Breeden*, 147 So. 757 (La. App. 1933). This is in accord with the French jurisprudence. See 4 Aubry et Rau, *op. cit. supra* note 29, at 558, 559, § 345.

66. Art. 1894, La. Civil Code of 1870; *Barrow v. Cazeaux*, 5 La. 72 (1833); *Pack v. Chapman*, 16 La. Ann. 366 (1861). See also 12 Baudry-Lacantinerie et Barde, *op. cit. supra* note 61, at 368, no 318.

is thus admissible merely to explain that which is already implied, and not to vary or contradict the writing.<sup>67</sup> Especially is this so when the parties have taken the precaution to show that they had in mind the payment of some price or consideration not expressed in the act, as for example when the sale is stated to be for a "valuable consideration."<sup>68</sup> In the second instance, the price being in itself insufficient to support the sale, it is regarded as a contract without a stated price and the same rule is applied.<sup>69</sup> With greater force is this rule applicable when the sale is made for one dollar and "other valuable consideration" in which case the additional consideration may be shown by parol.<sup>70</sup>

A more difficult problem is presented however when an attempt is made to show that a consideration other than the one stated is the true "price" for the contract. The decisions which admit parol evidence as not violating Article 2276, are in apparent conflict with perhaps a greater number of decisions in which parol evidence to show true consideration, or consideration other than that stated in the instrument, was inadmissible as violative of the parol evidence rule.<sup>71</sup>

67. *Klein v. Dinkgrave*, 4 La. Ann. 540 (1849).

68. *Breeden v. Breeden*, 147 So. 757 (La. App. 1933).

69. "If the true and only consideration had been \$1, the transaction would have been, not a sale, but an attempted donation in disguise. Rev. Civ. Code, art. 2464. As a donation, the transaction would be null . . . however, the law declares that a contract may be valid although the cause or consideration for making it be not expressed in the act; that what is meant by the cause or consideration of a contract is the motive for making it; and that, if the cause or consideration expressed in the act be not the true cause or consideration for making the contract, it shall, nevertheless, be valid, if the party can show that there was a true and sufficient consideration for the contract. . . . The defendant in this case has proven that there was a sufficient consideration to make the transaction valid as a contract of sale." *Moore v. Pitre*, 149 La. 910, 914, 90 So. 252, 254 (1921). See also *Morris v. Monroe Sand & Gravel Co.*, 166 La. 656, 117 So. 763 (1928).

70. *Linkswiler v. Hoffman*, 109 La. 948, 34 So. 34 (1903); *Morris v. Monroe Sand & Gravel Co.*, 166 La. 656, 117 So. 763 (1928); *Breeden v. Breeden*, 147 So. 757 (La. App. 1933). If the contract is silent as to price and no evidence is adduced to show the agreement of the parties concerning it, the contract is not enforceable as a sale. *Conway v. Bordier*, 6 La. 346 (1834); *D'Orgenoy v. Droz*, 13 La. 382 (1839); *Tiernan v. Martin*, 2 Rob. 523 (La. 1842); *Gorham v. Hayden*, 6 Rob. 450 (La. 1844); *Wise v. Guthrie*, 11 La. Ann. 91 (1856); *Forbes v. Burke*, 24 La. Ann. 85 (1872); *Landeché Bros. Co. v. New Orleans Coffee Co.*, 173 La. 701, 138 So. 513 (1931). At common law, when the contract is silent as to price, the contract is *enforced at a reasonable price*. Uniform Sales Act § 9(1), (4). This rule is made applicable to executed contracts as well as to executory contracts although, at first, the courts expressed doubt as to the applicability of the rule to cases when the contract had not been executed on either side. *Acebal v. Levy*, 10 Bing. 376, 3 L.J.C.P. 98 (1834); *Prosser*, *Open Price in Contracts for the Sale of Goods* (1932) 16 Minn. L. Rev. 733, 738-741.

71. *Delabigarre v. Second Municipality of New Orleans*, 3 La. Ann. 230 (1848); *Brown v. Brown*, 30 La. Ann. 966 (1878); *Jackson v. Miller*, 32 La. Ann. 432 (1880); *Robinson v. Britton*, 137 La. 863, 69 So. 282 (1915); *Loranger v.*

An examination of the cases will show, however, that the difficulty has arisen from the manner in which the rules have been stated rather than by inconsistent results. In *Robinson v. Briton*,<sup>72</sup> the plaintiff brought suit to annul a purported sale of land for a recited consideration of \$100.00. He alleged that the true consideration for the transfer was the defendant's promise to convey another tract of land to the plaintiff, and that the defendant had neither paid the money, as recited in the act, nor made the conveyance, as he had agreed. Evidence offered by the plaintiff to sustain his allegations was excluded as violative of the parol evidence rule, and judgment was given for the defendant.

In *Barre v. Hunter*,<sup>73</sup> the plaintiff had sold to the defendant a piece of property for a stated consideration of ninety dollars cash. Subsequently plaintiff brought suit to annul the sale on the grounds that the transfer had been made upon defendant's verbal promise to support and maintain the plaintiff, and for this purpose parol evidence was offered to prove his allegations. Here again parol evidence was rejected under the provisions of Article 2276, but the reasons for the ruling were not quite clear.<sup>74</sup> *Johnson v. Johnson*<sup>75</sup> was a case in which the plaintiff had sold a piece of property for a recited cash consideration of five hundred dollars and "other valuable considerations." Subsequently suit was brought to annul the sale on the grounds, amongst others, that there was no consideration for the sale. But the court held:

"We are also satisfied from the testimony that Mrs. Johnson personally did not receive any consideration for the sale. . . . However, in the absence of any showing of fraud or error the parol evidence introduced by the plaintiff and admitted upon the allegations of fraud or error was not admissible to show that the recited consideration of \$500 was not received by the plaintiff. . . . When plaintiff signed the instrument and ac-

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Citizens' Nat. Bank, 162 La. 1054, 111 So. 418 (1927); *Whittington v. Heirs of Pegues*, 165 La. 151, 115 So. 441 (1928); *Citizens Bank & Trust Co. v. Willis*, 183 La. 127, 162 So. 822 (1935); *Barre v. Hunter*, 181 So. 674 (La. App. 1938); *Johnson v. Johnson*, 191 La. 408, 185 So. 299 (1938).

72. 137 La. 863, 69 So. 282 (1915).

73. 181 So. 674 (La. App. 1938).

74. "The cases relied upon by the plaintiff . . . are inapposite. The theory, under which the parol evidence was admitted in those matters, was that it was not against or beyond what was contained in the acts as a contradiction of the clear recitals but, on the contrary, to give effect to the contract arising therefrom by supplementing necessary information which was omitted. In other words, the testimony was received for the purpose of enhancing the validity of the authentic act rather than for the purpose of destroying or impairing its sanctity." *Barre v. Hunter*, 181 So. 674, 675 (La. App. 1938).

75. 191 La. 408, 185 So. 299 (1938).



knowledge of the receipt of \$500 cash consideration for the sale, she was bound by her written acknowledgment. . . ."<sup>76</sup>

In *Whittington v. Heirs of Pegues*,<sup>77</sup> the defendant's mother had bought, during her marriage, a piece of property for a recited price of one thousand dollars for which she gave her promissory note. After the death of her husband she sold the land to the plaintiff who brought a petitory action to be declared owner of the entire tract. Defendants claimed ownership of one-half undivided interest on the grounds that when the property was purchased by their mother it was community property, and that consequently she could not have sold the entire tract. The plaintiff attempted to show by parol that the original act of sale to defendant's mother was in effect a donation, for no consideration was actually paid; but the court held that he was bound by the act and could not contradict the contents thereof by parol. In support of this ruling, the court quoted with approval from *Loranger v. Citizens' National Bank of Hammond*<sup>78</sup> to the effect that parol evidence was inadmissible for the purpose of contradicting the contract in order to substitute in its place a contract of a dissimilar nature.<sup>79</sup>

It may thus be observed that, in the cases where parol evidence was rejected, the evidence was offered to attack the validity of the contract in direct contradiction of the provisions of the writing and was properly rejected under Article 2276 of the Civil Code.

In those cases where parol evidence has been admitted under Article 1900 to show the real consideration for the sale, the evidence was offered by the person against whom want of consideration had been pleaded, after having admitted the allegation that the recited consideration was not the true cause for the contract. In *Brown v. Brown*,<sup>80</sup> the court stated: "The plaintiff's objection that the *defendant* could not prove what was the real consideration for the transfer . . . is not well taken. C. C. 1900." (Italics supplied.)

Again, in *Jackson v. Miller*,<sup>81</sup> the sale was attacked as simulated and fraudulent and void "for want of legal price and con-

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76. *Johnson v. Johnson*, 191 La. 408, 416, 185 So. 299, 302 (1938). See also *Grimm v. Pugh*, 197 So. 641 (La. App. 1940).

77. 165 La. 151, 115 So. 441 (1928).

78. 162 La. 1054, 111 So. 418 (1927).

79. See discussion on p. 388, *infra*.

80. 30 La. Ann. 966, 968 (1878).

81. 32 La. Ann. 432, 435 (1880).

sideration." The *defendant* then offered evidence to prove that the real consideration for the transfer was the delivery and cancellation of plaintiff's unpaid mortgage notes held by the defendant. The court said: "To say that this is to permit parol evidence to contradict the written contract is an abuse of terms."

In *Landry v. Landry*,<sup>82</sup> an action was brought to annul a sale of land on the grounds that the sale was simulated as the recited consideration of \$3,500.00 was never paid. The defendant *admitted non-payment* of the price, but sought to prove by parol the true consideration for the transfer. The court permitted the evidence saying:

"The construction which this article (1900) has uniformly received at the hands of this Court clearly authorized the admission of parol evidence to prove that by the stipulation of a price, paid cash in the sum of \$3500, the parties understood what was to them equivalent thereto. . . ."<sup>83</sup>

In *Citizens Bank & Trust Company v. Willis*,<sup>84</sup> plaintiff again sought to set aside a sale from mother to son on the grounds that the recited price of \$3,000.00 cash was not actually paid. The defendant's parol evidence to prove the real consideration was sought to be excluded on the grounds that it contradicted the terms of the writing. The court held the parol evidence rule inapplicable and allowed the proof to be made. In *Ryals v. Ryals*,<sup>85</sup> presenting the same facts as the *Landry* case, the court of appeal reached a similar result by permitting evidence as to the true nature of the consideration.

The cases may thus be divided into two groups: (1) those in which a direct attack is made by parol, and (2) those in which after the attack has been made, other evidence to show the validity of the contract has been admitted. The parties to the contract cannot contradict the written instrument by parol evidence by showing that no price was actually paid or that some other consideration was the cause of the contract. But should such proof be made by one of the parties, by other written evidence or even by parol evidence not objected to, the other party may avail himself of Article 1900 and show the actual consideration for the contract or the true character of the consideration given. In other words, it is only the party against whom a want of consideration

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82. 40 La. Ann. 229, 3 So. 728 (1888).

83. *Landry v. Landry*, 40 La. Ann. 229, 231, 3 So. 728, 729 (1888).

84. 183 La. 127, 162 So. 822 (1935).

85. 199 So. 841 (La. App. 1940).

is proved who can take advantage of the provisions of Article 1900. Thus, the jurisprudence of Louisiana on this point is really not conflicting and, furthermore, it is in accord with the rules applicable in France as heretofore shown.<sup>86</sup>

At this point, it is important to note that where parol evidence is admissible to show the actual consideration for the transaction, the nature of the contract may thereby be changed, as previously discussed; and though the courts have not generally distinguished the contracts involved, they have in some instances clarified the situation. In *Landry v. Landry*,<sup>87</sup> a sale was held to be in reality an onerous donation since the actual consideration for the transfer was the obligation undertaken by the "vendee" to provide for the maintenance and support of the "vendors" during the balance of their lives. Similarly, in *Simoneaux v. Lebermouth and Israel Planting Company*,<sup>88</sup> where the consideration supporting a transfer of a right of way was not a price in money, the court held:

"The act technically speaking, is not a sale, for the real consideration is not a price in current money. . . . But is rather the exchange of the right of way for the benefits to be derived from the construction of the road, and as such, it is perfectly valid."<sup>89</sup>

In *Nofsinger v. Hinch*<sup>90</sup> the court of appeal held that although the consideration proved by the defendants could not support a contract of sale because it was not a price in money, yet the transfer could stand as a valid donation.

In the case of *Loranger v. Citizens' Bank of Hammond*<sup>91</sup> a result apparently opposite to that arrived at in the *Landry* case was reached. The defendant, as judgment creditor of the plaintiff's husband, seized and advertised for sale a parcel of ground in execution of his judgment. The plaintiff, wife of the judgment debtor, sought to enjoin the sale claiming ownership of the land in question by virtue of a previous transfer to her from her husband. Since the transfer was in the form of a sale, and null on its

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86. For a general discussion as to the admissibility of parol evidence under Art. 1900, La. Civil Code of 1870, see Comment (1941) 3 LOUISIANA LAW REVIEW 427. For other cases on the same problem, see also cases cited under note 90, *infra*.

87. 40 La. Ann. 229, 3 So. 728 (1888).

88. 155 La. 689, 99 So. 531 (1924).

89. *Simoneaux v. Lebermouth & Israel Planting Co.*, 155 La. 689, 693, 99 So. 531, 532 (1924).

90. 199 So. 597 (La. App. 1941).

91. 162 La. 1054, 111 So. 418 (1927).

face because not coming within the provisions of Article 2446 of the Civil Code, the defendant rightfully contended that the title to the property remained in the husband, and thus subject to seizure.<sup>92</sup> The plaintiff sought to prove, however, by parol evidence, that the intention of the parties was to make a donation inter vivos and not a sale. To this evidence the defendant objected on the grounds that it was an attempt to vary the written instrument. The court sustained the objection saying:

"But to resort to such evidence for the purpose of contradicting or varying the contract entered into, in order to substitute in its place a contract of a dissimilar nature, is plainly reprobated by the textual provisions of our Code."<sup>93</sup>

It is submitted that the rule, *as thus announced*, is unsound. The reason why the evidence should have been held inadmissible was that the plaintiff, who sought to introduce it, was not the proper party to take advantage of Article 1900. He was not the party against whom the want of consideration was pleaded or proved. To say that parol evidence cannot be admitted to prove a contract different from that ostensibly contemplated by the parties is to beg the question since whenever parol evidence is admissible under Article 1900 a contract different from that expressed in the instrument is often the result. This follows from the fact, already discussed, that it is the consideration which determines the nature of the contract.

#### *Determination of Price by Parties or by Third Persons*

Article 2464 of the Civil Code requires that the price must be fixed and determined by the parties, but Article 2465 provides that it "may be left to the arbitration of a third person."

Several questions may arise from the provisions of these two articles: (1) Is Article 2465 an exception to the rule of Article 2464? (2) Must the parties name the appraisers or experts at the time of making the agreement? (3) May they agree that the price should be fixed by third persons to be subsequently appointed by them, and if so, what is the effect of such contracts and the liability of the parties under them?

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92. "... the putative sale from husband to wife, purporting to have been made for money in hand paid, is not valid upon its face, but is distinctly invalid, as being apparently in violation of a prohibitory law. It cannot, therefore, be said to evidence a real transaction, but leaves the title to the property, apparently, in the vendor, and subject to seizure at the suit of his creditor." *Rush v. Landers*, 107 La. 549, 560, 32 So. 95, 100 (1902).

93. *Loranger v. Citizens Nat. Bank*, 162 La. 1054, 1059, 111 So. 418, 420 (1927).

At first blush, it would seem that Article 2465 makes an exception to Article 2464, but upon closer examination it is clear that it is only the parties themselves who may fix the price for they alone are the parties to the contract. It cannot be logically contended that a stranger to the contract could dictate a price which would be binding on the parties unless they had so agreed, that is, unless they had appointed him for the purpose of fixing the price. The third party is thus the mandatary of the parties, and as such, his act in fixing the price is the act of the parties themselves.<sup>94</sup> This is important because it serves as the basis for determining whether the parties to the contract shall be bound by the estimation made by the experts. Having delegated to a third person authority to fix the price, the parties should be bound by his act under ordinary principles of mandate, and the price thus fixed should be binding on them.<sup>95</sup>

Ordinarily the stipulation leaving the price to the arbitration of a third person also names the person or persons charged with that duty, and in such a case the parties are bound by the contract for whatever price the appraisers shall fix. However, the appraisers may not be able or may even refuse to fix the price, in which event Article 2465 provides that there is no sale. Thus the sale is subordinated to the condition, suspensive in character, that the price shall be fixed and as long as the price remains undetermined the sale remains inoperative.<sup>96</sup> Once the price is determined

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94. This is the position taken by the French authorities. 5 Aubry et Rau, op. cit. supra note 29, at 16, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 113, n° 134; 16 Duranton, op. cit. supra note 30, at 150, n° 116; 24 Laurent, op. cit. supra note 29, at 85 et seq., n° 77; 10 Planiol et Ripert, op. cit. supra note 16, at 31, n° 37.

95. There is some disagreement between the commentators as to whether or not the price as fixed by the person appointed is irrevocably binding upon the parties. It is generally agreed that the price is not binding if there has been fraud or collusion; but as to whether simple error on the part of the "expert" or the fixing of an inequitable price will relieve the parties, the commentators are divided. See 5 Aubry et Rau, op. cit. supra note 29, at 16, § 349; 10 Planiol et Ripert, op. cit. supra note 16, at 32, n° 38.

The writer takes the position that since the appraisers are considered as the mandataries of the parties, the latter should be relieved only for causes which would ordinarily relieve the principal from the consequences of the acts of his mandatary. See 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 141, n° 140(2).

In *Krauss v. Kuechler*, 300 Mass. 346, 15 N.E.(2d) 207, 117 A.L.R. 1355 (1938), the Supreme Court of Massachusetts held that the parties are bound by the price fixed by the third person even if that person is an interested party provided no fraud or bad faith is shown.

96. Art. 2471, La. Civil Code of 1870; *Tiernan v. Martin*, 2 Rob. 523 (La. 1842); *Fort v. Union Bank of Louisiana*, 11 La. Ann. 708 (1856); *Frank I. Abbott Lumber Co. v. Home Insurance Co.*, 140 La. 130, 72 So. 841 (1916) (reversed on other grounds). See also *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 317, 35 So. 919 (1904). To the same effect see 5 Aubry et Rau, op. cit. supra

the sale is binding on the parties and it will have a retroactive effect to the date of contracting.<sup>97</sup>

Should the appraisers be unable to agree or unwilling to fix the price, the court does not have the power to intervene either by appointing other appraisers or by fixing the price itself. The French commentators on the Code Napoleon point out that if the court were permitted to fix the price whenever the mandataries of the parties refused or disagreed, the last clause of Article 1592<sup>98</sup> would be rendered inoperative since it provides that in such a case there is no sale. Furthermore, were the price to be fixed by another not designated by the parties, there would be lacking the element of consent because the parties have bound themselves only for the price which the designated persons should fix. Unless, therefore, they have agreed to the intervention of the court in case of disagreement, the latter has no authority to make their contract for them.<sup>99</sup> This result has been adopted in Louisiana.<sup>100</sup>

A different situation occurs when the parties have not by their agreement designated the persons charged with fixing the price, that is, when the parties have simply agreed to a price to be fixed by experts to be designated later.

In *Louis Werner Sawmill Company v. O'Shee*<sup>101</sup> it was held that such a contract was null and of no effect, and a number of French authorities were cited in support of the decision. There was an agreement to sell certain land at a price to be estimated by two experts to be thereafter chosen by the parties. The estimators were appointed but they could not agree as to the price. In a suit for *specific performance* the court sustained an exception of no cause of action, stating:

"The case being one, then, where the parties have agreed that the amount of the price should be determined and fixed by the

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note 29, at 17, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 134, n° 135; 24 Laurent, op. cit. supra note 29, at 81, n° 74.

The same result is obtained at common law under Section 10 of the English Sale of Goods Act and Section 10 of the Uniform Sales Act. Prosser, op. cit. supra note 100, at 781.

97. 5 Aubry et Rau, op. cit. supra note 29, at 17, n. 32, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 134, n° 135; 24 Laurent, op. cit. supra note 29, at 81, n° 74; 10 Planiol et Ripert, op. cit. supra note 16, at 32, n° 38. Cf. Arts. 2041, 2043, 2471, La. Civil Code of 1870.

98. Art. 1592, French Civil Code [Art. 2465, La. Civil Code of 1870].

99. 5 Aubry et Rau, op. cit. supra note 29, at 16, n. 29, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 138, n° 139; 24 Laurent, op. cit. supra note 29, at 82, n° 75.

100. *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 So. 919 (1904). At common law, similar results are had. Prosser, *A Handbook of the Law of Torts* (1941) 781-783.

101. 111 La. 817, 35 So. 919 (1904).

agency of estimators or experts to be thereafter named by themselves, the question is whether such a contract is valid as a sale. . . .

"With the exception of Duvergier (Vol. 1, no. 155) and one or two of the less authoritative writers, the French commentators on the Code Napoleon (article 1592, the exact counterpart of our article 2465) seem to agree that, *if the price is left to be determined and fixed by experts to be named by the parties, the contract is null*, since either of the parties has it in his power to nullify it by refusing to appoint the experts. . . .

"And to the same effect are the decisions of the courts. See, . . . Tissier, *Journal du Palais*, 1894, part. 2, p. 144, and the footnote, where it is said: 'It is now generally admitted that a sale made in consideration of a price to be determined by experts to be thereafter appointed has no binding character.'"<sup>102</sup> (Italics supplied.)

In the case of *Andrus v. Eunice Bank Mill Company*<sup>103</sup> the plaintiff sold to the defendant all the merchantable timber located on his land at a certain price per thousand feet of timber. The contract provided that (1) the defendant should have eighteen months within which to cut and remove the timber, and (2) if at the expiration of the eighteen months there remained any timber on the land the same was to be sold on a stumpage basis, the quantity to be determined by an estimate made by two experts to be appointed by the parties. The first part of the contract was performed, but that part of the contract relating to the timber remaining after the eighteen month period was not performed. A suit for specific performance of this part of the contract was maintained because, at the expiration of the eighteen months, there remained a definite quantity of timber for which the defendant was bound to pay the agreed price of so much per stump. The court distinguished the *Werner* case on the grounds that there the contract was never completed, whereas in the *Andrus* case, the stipulation as to the estimate to be made by the experts was an accidental stipulation to a completed contract of sale.

Justice Odom, in his dissenting opinion, considered that the contract was severable. Part of the contract contemplated the sale of timber to be cut and removed within eighteen months, and part of it contemplated the sale of timber remaining after the eighteen

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102. *Louis Werner Sawmill Co. v. O'Shee*, 111 La. 817, 820, 35 So. 919, 920 (1904).

103. 185 La. 403, 169 So. 449 (1936).

month period, the price for the latter to be determined by an estimate to be made by experts. True it was that the price was agreed upon beforehand at so much per stump, but until the number of stumps was ascertained the price was not determined, and could not be determined until the experts had agreed on the quantity of timber. Taking this view of the case, it was clear that the matter came within the rule announced in the *Werner* case, and consequently the contract should have been held unenforceable.<sup>104</sup>

Although the decision of the majority on this point may be questionable, it is submitted that the result reached was correct. Admitting that the contract was severable and remained inchoate as to the second part until the price had been ascertained, the plaintiff nevertheless alleged in his petition that a "certain and definite quantity of timber remained standing on [his] land"<sup>105</sup> and his allegation was necessarily admitted by the defendant for the purposes of the trial of his exception of no cause of action. Having thus admitted that there was a definite number of stumps left for which he had obligated himself to pay a definite price per stump, the defendant precluded himself from invoking the rule of the *Werner* case.

In any event, even if the defendant had been permitted to rely on the rule announced in the *Werner* case, he would have been in no better position since, when properly analyzed, that decision does not support his position. Although the court uses very strong language to indicate that the contract of sale is null and has no binding force where the price is to be ascertained by experts to be appointed thereafter, this statement is not exactly true and the French authors cited as authority therefor do not support it. As a matter of fact, the great weight of authority in France maintains that *the parties may stipulate that the price shall be fixed by experts to be thereafter appointed by them*. It is true that one of the parties may refuse to comply with his obligation of appointing the estimator and thus has it within his power to nullify the agreement; but the contract is nonetheless binding, even though it cannot be effective as a sale until and unless the parties have named the arbitrators and they have fixed the price. That the contract is ineffective if the parties only agree to designate the experts afterwards, is true only to the extent that there

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104. Though it does not appear whether the experts were ever appointed or whether if appointed, they failed to agree, it is presumed that the estimate of the number of stumps remaining had not been made.

105. *Andrus v. Eunice Band Mill Co.*, 185 La. 403, 411, 169 So. 449, 452 (1936).



is no sale. However, the contract is binding upon the parties to the extent that should either one refuse to comply with his obligation to appoint the appraiser, which is an obligation to do, he will subject himself to damages for the breach thereof.<sup>106</sup>

The rule announced in the *Werner* case should therefore be qualified by the foregoing. What was evidently intended was that the sale was unenforceable as such, but that the obligation to name the experts was nevertheless binding. This is shown not only by the fact that the right was reserved to the plaintiff to sue for damages (presumably for breach of contract), but also by the fact that the court expressed its intention to follow the majority of the French commentators, and not the views expressed by the "less authoritative writers" who sustained that the contract is void in its entirety as depending upon a purely potestative condition, and as producing no judicial effect.<sup>107</sup>

In this connection it is well to point out that although the court reserved to the plaintiff the right to recover damages, none would be forthcoming since the defendant had complied with all of his obligations. He had appointed the appraisers; and the fact that no agreement could be reached between the parties was due to the inability of the experts to reach a decision, and not to a refusal to comply with his obligation.

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106. 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 136, n° 138; 2 Baudry-Lacantinerie, Précis de Droit Civil (13 ed. 1925) 340, n° 748; 16 Duranton, op. cit. supra note 30, at 141-149, nos 108-114; 24 Laurent, op. cit. supra note 29, at 83-85, n° 76; 10 Planiol et Ripert, op. cit. supra note 16, at 33, n° 39. Cf. 6 Marcadé, op. cit. supra note 30, at 185.

A contrary view is expressed by Troplong as follows: "In effect, if the expert is not designated in the contract, it depends upon the will of the parties to prevent the fixing of the price and to render the sale null. It is a potestative condition on the part of either party. . . ." 5 Troplong, op. cit. supra note 32, at 205, n° 157. A similar statement is made by Huc in the following language: "The parties may reserve to themselves the faculty to designate the experts later. . . . If one of the parties refuses to concur on this designation, the contract must be regarded as non-existent, and cannot produce any judicial effect. Consequently the party who would take advantage of the sale, cannot be permitted to recover damages for the refusal of the other party to comply. . . ." 10 Huc, op. cit. supra note 29, at 59, n° 36.

At common law, the contract is regarded as inchoate until the price is determined, but failure to appoint the appraisers results in damages. This follows from the provisions of Section 10 of the Uniform Sales Act providing as follows:

"Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price . . . the contract . . . is thereby avoided . . . Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by parts IV and V of this act."

To the same effect, see Prosser, op. cit. supra note 100, at 783.

107. Ibid.

From the foregoing, it is evident that in cases wherein the experts are to be subsequently appointed by the parties, damages will be recoverable only when one of the parties is at fault in failing to cooperate in the appointment. If the obligation to do is breached by fortuitous circumstances or by any other event not within the power of the parties to prevent, no damages should be allowed.<sup>108</sup>

The effective date of the contract when the parties have agreed to designate the estimators at some future time is different from that of the contract in which the estimators are named in the act itself. In the latter case, the contract is effective as of the date of contracting.<sup>109</sup> Not so in the former, because the parties have done nothing with regard to the price; they have neither fixed it, nor have they given their mandate to do so. The sale will only be binding upon them when they have complied with their agreement to name the estimators, and then only subject to the suspensive condition that the experts name the price. Thus, as soon as the condition is fulfilled, the contract will come into existence but will be effective only from the date on which it became binding on the parties; that is, from the date of the appointment of the experts.<sup>110</sup>

#### *Determination of Price by Other Methods*

Under Article 2464 of the Civil Code, the parties are required to fix the price for the sale. For obvious reasons,<sup>111</sup> however, they may not be willing to agree on a fixed price, and consequently several devices have been adopted by merchants with the view to leaving the price more or less "open," to be ascertained by marketing or other conditions. There is nothing illegal or contrary to

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108. *Tiernan v. Martin*, 2 Rob. 523 (La. 1842); *Fort v. Union Bank of Louisiana*, 11 La. Ann. 708 (1856): "He can only obtain damages against the recalcitrant at fault who fails to execute his obligation to do, which he has contracted in the beginning." 10 *Planiol et Ripert*, op. cit. supra note 16, at 33, 34, n° 39. See also *Frank I. Abbott Lumber Co. v. Home Insurance Co.*, 140 La. 130, 72 So. 841 (1916) (reversed on other grounds). See also *Uniform Sales Act*, § 10, supra note 106.

109. "Although the price has not been, in principle, determined in an absolute manner, nevertheless, it no longer depends upon the will of the parties, and must, for this reason, be regarded as sufficiently determined for the formation of the obligation. The estimation, once made, retroacts to the date of the contract." 5 *Aubry et Rau*, op. cit. supra note 39, at 17, n. 32, § 349. To the same effect see authorities cited supra notes 96, 97.

110. 19 *Baudry-Lacantinerie et Saignat*, op. cit. supra note 16, at 136, n° 138 (1°).

111. One of the important functions of the price in a contract of sale, particularly in the sale of goods or merchandise, is to shift, as between the parties, the risks of price fluctuations in the market. *Llewellyn*, loc. cit. supra note 14.

public policy in such agreements.<sup>112</sup> One possible objection that may be made, however, is with regard to the price, since the validity of such agreements as sales depends upon whether the price stated has been fixed with sufficient certainty.

According to the French authorities, the certainty of price is satisfied when it has been sufficiently designated by the parties so that, even though the exact amount thereof be unknown at the time of contracting, it may yet be ascertained from other factors, provided that it is not within the power of the parties to diminish it or to augment it at will.<sup>113</sup> Thus, there is uncertainty as to price and consequently no sale when the buyer is to pay what he wishes or what the seller requires.<sup>114</sup>

*Price to Be Fixed Later.* When the parties agree that the price will be fixed by them at some future date, the contract is invalid as a sale because it lacks one of the essential elements of the contract; and it would not become binding until the parties had come to a definite agreement as to the price. Such an agreement, says Professor Williston, "amounts to nothing more than a promise by

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112. In *Baucum and Kimball v. Garrett Mercantile Co.*, 188 La. 728, 178 So. 256 (1937), the Supreme Court of Louisiana said:

"But a contract of sale is not illegal where it provides for the fixing of the price to be paid according to the value, or the future market price, of the property sold. . . .

"In the case at bar, the defendants entered into a contract for the sale of their cotton to the plaintiff, which provided for the immediate delivery of the cotton and for the fixing of the price therefor in accordance with the market value of the cotton on the New York Cotton Exchange as of the future date and that an advance be made to them by the purchaser, using as a basis therefor the quotation for cotton of similar grade on the New York Cotton Exchange as of the future date agreed upon, less a broker's commission and a margin for the purchaser's protection. In our opinion, such a contract does not entail any of the elements of a bet or wager, nor anything won or lost at gaming. The fact that, upon the conclusion of such a sale, the market value of the cotton might be higher or lower than was the advance quotation as of the date on which the contract was entered into, does not of itself constitute gaming or betting within the meaning and contemplation of Articles 2983 and 2984 of the Revised Civil Code any more than if the defendants had held their cotton and borrowed money thereon in anticipation of a rising market."

113. 5 Aubry et Rau, op. cit. supra note 29, at 17, 18, § 349; 19 Baudry-Lacantinerie et Sagnat, op. cit. supra note 16, at 131, 132, nos 132, 133; 16 Duranton, op. cit. supra note 30, at 139, 140, n° 106; 24 Laurent, op. cit. supra note 29, at 80, n° 73; 10 Planiol et Ripert, op. cit. supra note 16, at 30, n° 36; 5 Troplong, op. cit. supra note 32, at 202, n° 151.

114. "Article 1591 requires that the price be determined by the parties. . . . It is elementary that there is no price if the vendor leaves it to the discretion of the buyer, or if the buyer declares that he will pay what the vendor will require. . . ." 24 Laurent, op. cit. supra note 32, at 202, n° 151. See note 125, *infra*.

The same rule obtaining in France obtains in Spain by virtue of the provisions of Articles 1447, 1448, 1449 of the Spanish Civil Code, and particularly the provision of the latter article which provides that the determination of the price may never be left to the judgment of one of the contracting parties. See also 10 Manresa, op. cit. supra note 36, at 44-47.

the buyer to pay such price as he chooses, for he need agree to nothing which he does not choose"<sup>115</sup> and consequently, the contract would be invalid for the further reason that the determination of the price is left to the discretion of one of the contracting parties.<sup>116</sup>

*Alternative Prices.* The contract may sometimes state an alternative price. Although it may be argued that in such cases the contract should be enforced at the price most favorable to the seller,<sup>117</sup> it is submitted that because of the strict requirement as to certainty of price the contract should fail.

*Price Depending on the Market.* The price may be made to depend, however, upon the state of the market at a certain time and place. In such cases the French authorities say that the price is certain even though the amount thereof be unknown to the parties at the time of contracting. In cases where this is done, it is not within the power of either of the parties to diminish or to augment the price at will; but it depends upon a contingency beyond the control of either party.<sup>118</sup> For the same reason, a sale price based on retail prices would also satisfy the requirement of certainty.

*Maximum and Minimum Prices.* Sometimes the price is made to depend on maximum and minimum prices. Typical contracts of this kind are the sales of commodities on the stock exchanges in which it is generally agreed that the buyer is to pay the market price as of a particular day, not less than a stipulated minimum. Here again the difficulty is one of determining whether the price has been fixed with sufficient certainty. A logical interpretation of such a contract is that the purchaser is to pay the market price as of the date stipulated, but that should this price be less than the minimum, he will pay the minimum stipulated. It must be noted that this is not the same as agreeing to pay an alternative price because here it is not within the control of either of the parties to

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115. 1 Williston, Sales (2 ed. 1924) 311, § 167.

116. See authorities cited in note 114, supra. The same result is reached at common law although it has been suggested that in such cases the contract should be enforced at a reasonable price. Prosser, op. cit. supra note 100, at 743-749.

117. Arts. 1957, 1958, 2472, La. Civil Code of 1870. See Prosser, op. cit. supra note 100, at 749.

118. 5 Aubry et Rau, op. cit. supra note 29, at 17, 18, § 349; 16 Duranton, op. cit. supra note 30, at 139, 140, n° 106; 10 Huc, op. cit. supra note 29, at 57, 58, n° 36; 10 Planiol et Ripert, op. cit. supra note 16, at 30, n° 36. Planiol et Ripert state here that it suffices that the price be capable of determination by one or a series of simple arithmetical operations.

decrease or augment the price, but such determination depends upon the market conditions.

In Louisiana, this same result would follow, as is clearly seen from the case of *Landeche Brothers Company v. New Orleans Coffee Company*.<sup>119</sup> In that case, syrup was sold at a certain price per gallon if sugar sold at designated price per pound. The market price of sugar at no time during the season reached the lowest price named in the contract and the court therefore concluded that there was no sale because the parties did not intend to bind themselves except on condition that sugar sold at the price named in the contract. It is further intimated that the contract would have been enforceable had there been an agreement as to price in the event the commodity sold for less than the price stated in the contract.<sup>120</sup>

*Competitive Prices.* Agreements to meet prices of competitors are likewise valid in France, the theory being that the price is so far determined that neither of the parties has it in his power to change it at will. Thus, Duranton states:

"But the price is none the less certain from the beginning, although the amount thereof be not known to the parties at the time of the contract, when it is not within the power of one of them to augment it or diminish it. It is sufficient that it be ascertainable by relation to certain circumstances. . . . Such is . . . the case where small vineyard proprietors or cultivators sell their wine after, or even before, the harvest, at the price at which another who has a well stocked cellar will sell his. . . ."<sup>121</sup>

On the other hand, there is disagreement among the French authorities as to whether a sale at a price which might be offered to the seller is valid. One line of authorities supports the view that such a contract does not constitute a sale but rather an agreement on the part of the vendor to give preference to a particular person, if he should conclude to sell at all.<sup>122</sup> Furthermore, Pothier points out that it would be against public policy to enforce such

119. 173 La. 701, 138 So. 513 (1931).

120. "Plaintiff's counsel . . . contend that the contract itself shows that this was an unconditional sale . . . but if it be conceded that counsel's contention is correct, their client is in no better plight, for the reason that *there was no agreement as to the price of the commodity if sugar sold for less than 15 cents. . . .*" *Landeche Bros. Co. v. New Orleans Coffee Co.*, 173 La. 701, 706, 138 So. 513, 515 (1931). For the treatment that such contracts have received at common law, see Prosser, *op. cit. supra* note 100, at 774-781.

121. 16 Duranton, *op. cit. supra* note 30, at 139, 140, n° 106. To the same effect see 1 Guillouard, *op. cit. supra* note 36, at 130, n° 109, and authorities cited *supra* note 113.

122. 1 Pothier, *Treatises on Contracts* (Cushing's Transl. 1839) 16, n° 27.

contracts since they would give rise to much fraud, for the "buyer, in order to obtain the thing for a small sum, might bring forward a person to offer a mean price; and the seller, with a view to obtain a large sum, might interpose an offer of a high price. . . ."<sup>123</sup>

Guillouard, on the other hand, states that this interpretation is entirely contrary to the will of the parties. It is not their intention that the seller should sell the thing when and if he decides to do so and to give the preference to the purchaser; there is, rather, a real and actual agreement whereby the vendor is obliged to sell the thing, if and when a fair offer is made to the vendor and the purchaser is bound to buy it at the price so offered. According to this interpretation the transaction is considered a sale under a suspensive condition.<sup>124</sup>

It is clear that under any interpretation the price is uncertain for it depends upon the will of the vendor. In other words, the vendor is the sole master of the situation, and the final determination of the price depends upon what he considers fair. The contract therefore should be void for uncertainty.<sup>125</sup>

#### *Louisiana Law*

The Louisiana courts have not announced any definite rule for our guidance to determine when the price is or is not certain. From an examination of the jurisprudence, however, it might be shown that the adoption of the French test will not be in contravention of the principles established by the code or those announced by the courts.

The supreme court has consistently held that the price is uncertain when it is clear that the parties have not given their consent to be bound by a specific amount. For example, when the

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123. *Ibid.* To the same effect see also 5 Aubry et Rau, op. cit. supra note 29, at 18, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 132, n° 132; 5 Troplong, op. cit. supra note 32, at 203, n° 153.

124. 1 Guillouard, op. cit. supra note 36, at 130-132, n° 111; 10 Huc, op. cit. supra note 29, at 58, n° 36.

125. According to Planiol and Ripert, when the buyer has left the determination of the price to the vendor, the contract may be enforced as an agreement on the part of the buyer to accept the price fixed by the seller, but in such cases, the sale will not be concluded until this has been done. 10 Planiol et Ripert, op. cit. supra note 16, at 30, n° 36. In support of this statement the case of Duhamel v. Delpierre-Gournay, Douai, 15 mars 1886, D.88.2.37 is cited. The case does not support the statement. In that case the court held that in a sale of goods with the stipulation that the price should be fixed by the vendor, the buyer cannot demand the nullity of the sale *once he has accepted delivery of the merchandise* for then it no longer depends upon any one of the parties to modify the contract.

In other words, liability for the price is predicated not on the contract but upon quasi contractual principles as heretofore explained.

parties have contracted to sell for "a good and valuable consideration"<sup>126</sup> or when the price agreed upon has not been unequivocally stated, as for example when the sale has been made "for about" so much, not specifying a definite sum.<sup>127</sup> The price is also said to be uncertain when it is to be paid in installments bearing interest the amount of which has not been stated because, in such cases, the interest is considered as part of the purchase price.<sup>128</sup>

It is readily observed, in the above instances, that the price has not been sufficiently designated by the parties. In every one of the given situations, no agreement has been reached concerning the price, and it is within their power to augment or diminish it. This may well be given as the reason why the price is said to be uncertain.

Will the price be certain within the meaning of Article 2464

126. *Conway v. Bordier*, 6 La. 346 (1834); *Gorham v. Hayden*, 6 Rob. 450 (La. 1844); *Wise v. Guthrie*, 11 La. Ann. 91 (1856); *Aguader v. Quish*, 21 La. Ann. 322 (1869).

127. *Forbes v. Burke*, 24 La. Ann. 85 (1872); *Wright and Anderson v. Anthon*, 17 La. App. 633, 136 So. 753 (1931).

128. *Kaplan v. Whitworth*, 116 La. 337, 40 So. 723 (1906). In that case there was a purported sale of land for a stated consideration of \$500 cash and the rest represented by several notes aggregating \$7,000 making a total consideration for the sale of the land "seven thousand five hundred dollars (\$7,500) and interest." It was held that "if the parties agree that they shall make a sale, or a promise of sale, in the future, but fail to agree . . . as to the price at which the sale is to be made, they evidently fail to make any agreement at all. And it is equally plain that, if the rate of the interest which the deferred part of the price is to bear is not fixed, the price is not fixed; *this interest being a component part of the price.* . . ." (116 La. at 346, 40 So. at 726.)

The argument may be advanced, however, that the price was fixed at \$7,500 and that each note carried interest only from the date of maturity (though this does not appear) and as such it was a penalty for the non-payment of money, in which case, it does not form part of the price. See *Dendinger Inc. v. Emuy & Eichorn & Globe Indemnity Co.*, 12 La. App. 39 (1929).

In the case of *Hibernia Bank & Trust Co. v. McCall Bros. Planting & Mfg. Co.*, 140 La. 763, 73 So. 857 (1917), it was held that attorneys' fees to be paid in the event suit is brought to recover the price of sale form part of the price and carries a vendor's privilege on the thing sold. On the other hand, in the following contract "7 per cent discount if paid within 10 days from delivery date. If not paid by the last of the month following 10 per cent will be added to the above price" it was held that the 10 per cent increase in the price was not part of the price, but was a penalty for failure to pay by the last of the month and in that sense came within the definition of "interest" as damages due for the delay in the performance of an obligation to pay money. *Dendinger Inc. v. Emuy & Eichorn & Globe Indemnity Co.*, 12 La. App. 39 (1929).

Some French commentators are of the opinion that the price is sufficiently certain when it has been fixed and agreed upon, although it is to be augmented by a sum which is uncertain, as for example, a sale for \$500 and whatever else the vendee wishes to pay. 16 *Duranton*, op. cit. supra note 30, at 140, n° 107. 5 *Troplong*, op. cit. supra note 32, at 202, n° 151. Accordingly, it should follow that a sale of a stated sum and interest is not void for uncertainty as to price.

if, though not known at the time of contracting, it may nevertheless be ascertained later from other circumstances?

In *Clark v. Comford*<sup>129</sup> there was an agreement to sell a tract of land at two dollars per acre, but the number of acres in the tract was unknown. Holding that the contract was unenforceable for uncertainty as to price, the court said:

"While \$2.00 per acre was agreed upon to be paid, yet the number of acres which were to be the object of the purchase was uncertain, only ascertainable upon some fact to be afterwards established. . . . The "thing sold" being uncertain, the price of the same, being predicated upon the number of acres in the tract, necessarily became also uncertain."<sup>130</sup>

In *Gallaspy v. A. J. Ingersoll & Company*<sup>131</sup> the parties had entered into two contracts for the sale of one hundred bales of cotton "to weigh about 25,500 pounds" at so much per pound. The court found the contracts certain as to object<sup>132</sup> and therefore certain as to price, because the number of pounds per bale being certain the price for the whole could be easily ascertained. The court said:

"Counsel say the price is indefinite. The price was fixed at 11½ cents per pound. . . . If the thing was certain, the price is necessarily certain. In the contract the price is clearly certain, for what was sold was cotton of a grade not below middling, and the middling price was fixed. . . .

"That is certain which can be made certain; and the price is readily ascertained. . . ."<sup>133</sup>

These two cases apparently announce different rules. Granting that in the *Comford* case the object of the sale was uncertain, could it not have been ascertained? Or are the cases to be distinguished on the fact in one case the thing was certain whereas in the other it was not?

A closer analysis of the *Comford* case shows that the price was never ascertained because an estimate of the number of acres in the tract of land was never made. It is submitted that if an

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129. 45 La. Ann. 502, 12 So. 763 (1893).

130. *Clark v. Comford*, 45 La. Ann. 502, 511, 12 So. 763, 767 (1893).

131. 147 La. 102, 84 So. 510 (1920).

132. "What was sold in each case was 100 bales of cotton of an average weight of 515 pounds per bale . . . 'the addition of the qualifying words "about" . . . is only for the purpose of providing against accidental variations' . . ."

133. *Gallaspy v. A. J. Ingersoll & Co.*, 147 La. 102, 109, 84 So. 510, 513 (1920).



estimate of the acreage had been made, there would have been no question but that the parties would have been bound to their contract. The case then resolves itself to one in which the contract depended upon the happening of a condition, which was never accomplished, and consequently the contract never became binding. The result of the case was therefore correct but the basis on which it was predicated, if we are to take the court literally, is faulty unless the price is deemed uncertain when, although determinable, it has not yet been determined. Such a position however cannot be accepted in view of Article 2465 and the jurisprudence thereon according to which a price is sufficient to support a sale even if left to the arbitration of a third person. In such cases, the price is not known with certainty; it is only determinable, and when so determined the sale is operative.

A similar situation exists when produce is sold presently at future market prices. Typical contracts are those for the sale of commodities at a price per given quantity for each cent in proportion to the weekly average price of the commodity as sold on a given market. The price ultimately depends upon the weekly average price for a given week, and while it is true that the price has been fixed, the basic measure is not determined but merely determinable. Yet the courts have impliedly approved such contracts as valid and the question as to uncertainty has never arisen.<sup>134</sup> In *Landeche Brothers Company v. New Orleans Coffee Company*,<sup>135</sup> syrup was sold at a price "made to depend upon the market of Y. C. Sugar," the contract stipulating that the price of the syrup per gallon "was to be  $\frac{1}{2}$  times the price of Y. C. sugar 'if sugar sells at 15 cents to 20 cents per lb.' . . . and 6 times the price of sugar if it sells for 25 cents to 30 cents." The market price of sugar at no time during the season reached the lowest price named in the contract, and consequently the court concluded that the parties were not bound since under their interpretation of the contract, "the parties did not intend to bind themselves to sell and to buy, *except on condition* that the sugar sold at prices named in the contract. . . ."<sup>136</sup> (*Italics supplied.*) The court further pointed out:

"Plaintiff's counsel in oral argument and in brief earnestly

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134. *LeBourgeois v. Gramercy Co.*, 50 La. Ann. 813, 24 So. 279 (1898); *LeBlanc v. Godchaux Co.*, 152 La. 405, 93 So. 201 (1922); *Landeche Bros. Co. v. New Orleans Coffee Co.*, 173 La. 701, 138 So. 513 (1931).

135. *Ibid.*

136. *Landeche Bros. Co. v. New Orleans Coffee Co.*, 173 La. 701, 705, 138 So. 513, 515 (1931).

contend that the contract itself shows that this *was an unconditional sale*. . . . But if it be conceded that counsel's contention is correct, their client is in no better plight, for the reason there was no agreement as to the price of the commodity if sugar sold for less than 15 cents, which it did. . . ."<sup>137</sup>

It is thus clear that though the price was not definitely fixed it was nevertheless ascertainable, and it is strongly intimated, if not definitely stated, that the contract would have become binding on the parties the moment the price of sugar rose to fifteen cents per pound during the season. That the contract was subordinated to this condition, and that such was the holding of the court, there is no doubt; and the reason why the contract was unenforceable was because the condition was never accomplished, not because the price was uncertain.

It must also be noted in this case, as well as in those instances where the price is left to the arbitrament of a third person, that while the price is designated by the parties at the time of contracting, it is not definitely known to them, but depends upon other circumstances beyond their power or control. Clearly then, the rule resolves itself to this: That the price is sufficiently certain within the meaning of Article 2464 when its amount, though unknown to the parties at the time of contracting, may be ascertained from other factors not within the power of the parties to control, that is, when neither party can diminish it or augment it at will. Accordingly, a sale for a price which depends upon current wholesale or retail market prices on a certain date will be good, since the price is sufficiently fixed as far as the parties are concerned, it not being within their power to control it.<sup>138</sup>

*Patton's Heirs v. Mosely*,<sup>139</sup> however, would seem to create some doubt as to the applicability of the principle just enunciated. That was a case involving a sale of mineral rights by the plaintiff's ancestor to one Roy who sold to the Acme Investment Company, which in turn sold to the defendants one of whom was a minor at the time of the transfer. The rights conveyed were never exercised by any of the vendees, and the plaintiffs brought suit to clear their title alleging extinguishment of mineral rights by non-user. Defendants contended that the prescription had been interrupted by the sale from the Acme Company to the defendants one of whom was a minor, relying on the doctrine of *Sample v. Whit-*

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137. 173 La. at 706, 138 So. at 515.

138. See cases cited in notes 133, 134, *supra*.

139. 186 La. 1088, 173 So. 772 (1937).

aker,<sup>140</sup> but the court held that this rule was inapplicable because the sale to the defendants was a mere simulation. The court added:

"... the testimony shows that no cash, nor its equivalent, nor any other consideration passed between the parties; and that the deed was executed under a collateral agreement, ... that if the designated vendees could realize anything out of the sale of the property, or production therefrom, they would then pay Roy, the vendor, \$1 per acre, together with one-sixth of all sale or production derived from the property. In other words, the defendants were neither to pay nor to be responsible for the alleged purchase price, which was to be derived solely from the property itself.

"Looking to the private agreement of the parties to ascertain their intent and purpose, we have no difficulty in determining that there was no sale of the mineral rights. If nothing is realized by the alleged vendors [vendees] from the sale or production of the property, admittedly, they will pay nothing and owe nothing to their alleged vendor ...

"In the agreement between the parties, the essentials of a sale were entirely lacking. *There was not only no price agreed to be paid, but also no certainty as to the payment of what was agreed on, the payment being wholly conditioned on the apparent vendees' realizing out of the property itself.*"<sup>141</sup> (Italics supplied.)

The position taken by the court that no price was agreed upon is faulty for, admitting that the stated consideration was simulated, the testimony showed that the price of one dollar per acre "together with one sixth of all sale or production derived from the property" was to be paid. A price was thus agreed upon and the mere fact that the payment thereof was conditioned under the vendees' exploitation of the property should not have been held to annul the sale. What Article 2464 means, when it says that the price must be certain, is that the price must be agreed to by the parties and sufficiently determined by them. *There is no requirement that there be certainty as to its payment.*

The result reached cannot therefore be justified on the ground that there was no price or that there was no certainty as to the payment of that which was agreed upon. It may be justified, how-

140. 172 La. 722, 135 So. 38 (1931), holding that minority of co-owner suspends prescription.

141. Patton's Heirs v. Moseley, 186 La. 1088, 1093, 173 So. 772, 774 (1937).

ever, on the ground that the sale never became operative because the condition, upon which the determination of the price depended, never took place, and the ownership of the property was never transferred to the defendant, because neither of the vendees elected to exercise the rights granted.<sup>142</sup> Again, it is possible that the court may have reached the conclusion, which the facts of the case seem to warrant, that the price was not serious and not intended to be paid, or that it depended purely upon a circumstance within the power of one of the parties to control, and was therefore uncertain.

The first solution offered finds support in the case of *Wright and Anderson v. Anthon*,<sup>143</sup> a case which turned upon an alleged sale of cows "for about \$50 a head." The court found, and correctly so, that the price was uncertain, but it went on to say:

"But there is another consideration which prompts us to regard the sale with further doubt as to its validity. Both parties testify that the price was to be paid after the cows would have made enough profit as dairy cows for their new owner to pay for themselves. A sale under such contingency might be construed as one made with a suspensive condition, which, under the provisions of article 2471 of the Civil Code 'does not transfer the property to the buyer, until the fulfillment of the condition'. Mrs. Anthon's testimony is to the effect that she had not been paid anything yet on account of the purchase price, from which it can readily be assumed that the condition had not been fulfilled."<sup>144</sup>

In view of the foregoing, it may be stated that the French rules regarding certainty of price are not only applicable in Louisiana, but also that they do not contravene any principles which our better adjudicated cases have announced. The price should be deemed certain, therefore, if it has been so sufficiently determined by the parties that the amount thereof is susceptible of ascertainment from other factors or circumstances not within the power of the parties to control.

### C. SERIOUSNESS OF PRICE

The last two paragraphs of Article 2464 of the Civil Code provide as follows:

"It (the price) ought to be serious, that is to say, there

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142. Art. 2471, La. Civil Code of 1870; *Wright and Anderson v. Anthon*, 19 La. App. 622, 136 So. 753 (1931).

143. 19 La. App. 622, 136 So. 753 (1931).

144. *Wright and Anderson v. Anthon*, 17 La. App. 622, 136 So. 753 (1931).

should have been a serious and true agreement that it should be paid.

"It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

From the nature of the conditions imposed by this article it must be admitted the determination of the seriousness of the price depends in the last analysis *on the intention* of the parties because in order for the price to be a true price, it is necessary that the parties propose to pay it, receive it or demand it. Taken literally these two paragraphs seem to impose two conditions as regards the price: (1) it must be serious, and (2) it must not be out of all proportion to the value of the thing sold. It is therefore important to determine whether the two paragraphs are to be taken together to constitute one requirement, or whether they embody two different requirements as to price, both essential to the validity of the contract of sale.

The prevailing doctrine of "serious consideration" in Louisiana is deduced from the provisions of this article, with the result that contracts are invalid unless equivalents are exchanged.<sup>145</sup> It is not within the scope of this paper to consider the soundness of this theory as applied to all contracts. Pertinent, however, is a discussion of the theory as particularly applied to the contract of sale and inquiry as to the validity of the contract when the price paid cannot be regarded as the equivalent of the thing sold.

For a proper understanding of the provisions of the article, a study of its origin and development is necessary and we are at once thrown back to the Code Napoleon from which so many articles of the Louisiana Civil Code were taken. It is noteworthy that Article 2464 did not appear in its present form until the adoption of the Civil Code of 1825. In 1808, it merely consisted of the first two paragraphs which in substance required (1) that the price be certain, and (2) that it be a sum of money.<sup>146</sup> The corresponding Code Napoleon article on the other hand, consists only of the first paragraph of our article and merely requires that the price be fixed and determined by the parties.<sup>147</sup> But despite the appar-

145. *Murray v. Barnhart*, 117 La. 1023, 42 So. 489 (1906).

146. La. Civil Code of 1808, 1.11, pp. 346, 347 [Compiled Edition of the Civil Codes of Louisiana, at Art. 2464, 3 La. Legal Archives, Part II (1942) 1358].

147. Art. 1591, French Civil Code [Compiled Edition of the Civil Codes of Louisiana, at Art. 2464, 3 La. Legal Archives, Part II (1942) 1358]: "*le prix de la vente doit être déterminé et désigné par les parties.*"

ent insufficiency of the Napoleonic articles, French courts and jurists found that other requisites were also necessary to constitute a valid price; requirements which did not have to be stated since they were necessarily implied from the nature of the contract itself. Thus it was concluded that the price ought to be serious, for without it there could be no sale, the price being an essential element of the contract.<sup>148</sup>

It is significant also that in the Spanish Civil Code nothing is said with regard to the seriousness of the price. As pointed out by Manresa, however, this does not mean that this requirement can be eliminated, because a price means of course a price which is real and intended to be paid, since a false or simulated price is not in reality a price.<sup>149</sup> The question as to when the price was or was not serious became of primary importance. It was universally recognized that the price was not serious when (1) the price stipulated was fictitious, that is, when the parties had clearly intended that it should not be paid, and (2) when the disproportion with the value of the thing was such that the parties could not have regarded it as the motive for the contract, as for example, when a plantation of considerable value was sold for a crown.<sup>150</sup>

A minority of French jurists listed a third instance in which the price was deemed not to be serious, namely when it was small enough to warrant the inference that the parties could not have regarded it as the equivalent of the thing sold.<sup>151</sup> The great majority of the French authorities, however, exploded this theory, maintaining that the mere fact of a much inferior price did not affect the validity of the sale; that a price, no matter how inferior, would support a sale provided that the parties had contracted in contemplation thereof, and that if at all, such a price would only offer grounds for rescission under the articles on lesion. The argument was that, if a sale was null because the price, although intended by the parties as the cause for the transfer, was not deemed the equivalent of the thing sold, the provisions of the lesion articles which give the vendor the faculty of rescinding the transaction, would be rendered nugatory. The mere fact that the

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148. See authorities cited in note 151, *infra*.

149. 10 Manresa, *op. cit. supra* note 36, at 38(a).

150. 1 Pothier, *op. cit. supra* note 122, at 12, 13, nos 19-21. Authorities cited in note 151, *infra*.

151. See 5 Aubry et Rau, *op. cit. supra* note 29, at 14, n. 26, § 349; 6 Marcadé, *op. cit. supra* note 30, at 186. The authorities entertaining this view seem to have abandoned it in favor of the validity of the contract of sale even when the price is not the equivalent of the thing sold. See 4 Zachariae, *Le Droit Civil Français* (4 ed. 1858) 271, § 675.

price was much inferior to the value of the thing should not of itself be sufficient to nullify the sale. It may have been that the vendor was mistaken as to the value of the thing which he sold, or that he was pressed by circumstances to sell for any price which was offered. If such was the case, it could not be said that the price was not serious, for it was evident that the sale had been made in all earnest and in consideration of the price stated, however disproportionate it was to the value of the thing.<sup>152</sup>

Manresa, in his commentaries to the Spanish Civil Code makes the following observation:

"We have said that the price is economic equivalent of the thing sold. Now, if we examine closely any contract of sale, the amount of the price and all the factors that determine the value of the thing sold, and try to establish the relation between both elements, weighing and debating if such economic equivalent is given, what is done, in substance, is to examine the justness of the price, that is, to determine if the price is or is not a just price. But without going into such an extensive examination, as we might do at first, there are cases in which the enormous disproportion that exists between those economic values is plain. It is no longer a case in which the price is lower than the average, or smaller than the lowest; but a case of an insignificant price. This derisive price, the unbelievable quantum of which at once discloses its non-existence, is the false or simulated price. But the reason why it is so classified must be perfectly understood. *It is so classified*, not merely because of the disproportion between its value and that of the thing sold, that is, not because of the lesion that the vendor may have suffered, even though it be beyond the fifth, or the fourth, or the half of the value of the thing sold, but *because its insignificance denotes its falsity, its non-existence.*"<sup>153</sup>

Thus, the better authority in France and Spain is that the price is not serious when the parties *have expressly intended* that it should not be paid, or when the price named is so out of proportion to the value of the thing that it is evident that they could

152. 2 Baudry-Lacantinerie, op. cit. supra note 106, at 339, n° 747; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 16, at 123, 129, n° 130; 1 Guillouard, op. cit. supra note 36, at 114, n° 96; 10 Huc, op. cit. supra note 29, at 55-57, nos 34-35; 24 Laurent, op. cit. supra note 29, at 88-95, nos 79-87; 6 Marcadé, op. cit. supra note 30, at 186; 2 Planiol, op. cit. supra note 64, at 516, n° 1375; 10 Planiol et Ripert, op. cit. supra note 16, at 29, n° 35; 5 Troplong, op. cit. supra note 32, at 193 et seq., n° 150; 4 Zachariae, loc. cit. supra note 150.

153. 10 Manresa, op. cit. supra note 36, at 40.

only have indicated it in jest and without regarding it as part of the bargain.

It may well be therefore that in the last two paragraphs of our Article 2464, the redactors sought to codify the French doctrine as to the seriousness of the price; that is, that there should be a true and serious agreement that it should be paid, and that it should not be so out of proportion to the value of the thing to warrant the inference that the parties did not regard it as part of the contract. If so, the last two paragraphs of Article 2464 explain what is meant by a serious price, and do not establish a norm for adequateness of price. That this was the intention of the drafters of the code is substantiated by the inclusion of Article 1860 and following, which clearly indicate that a price much inferior to the value of the thing sold does not make the contract void. And yet, the opposite result would follow if the doctrine of serious consideration were applied to the contract of sale.<sup>154</sup>

However, our courts have interpreted Article 2464 as requiring that in addition to being serious the price must be in proportion to the value of the thing sold. In *Saunders v. Busch-Everett Company*<sup>155</sup> the court speaks of Article 2464 as follows:

"It provides that the price should be certain, that it should consist of money, that it should be serious; that is to say, that it should not be a mere pretended price the payment of which is not contemplated; and that it should not be out of all proportion to the value of the thing. In this instance the price, paid at the signing of the contracts . . . was \$276.72 . . . all in strict accordance with the terms of the contract. The price, (if the transaction is regarded as a sale) was therefore certain. It was paid in money. And, having been actually so paid, it can not be said that it was not serious, within the meaning of

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154. Art. 1860, La. Civil Code of 1870: "Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for, in every commutative contract, equivalents are supposed to be given and received."

Art. 1861, La. Civil Code of 1870: "The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contracts, on account of such implied error or imposition, except in the two following cases: (1) In partition. . . (2) in sales of immovable property, the vendor may be relieved, if the price given is less than one-half of the value of the thing sold; but the sale can not be invalidated for lesion to the injury of the purchaser."

Art. 1862, La. Civil Code of 1870: "Lesion can be alleged by persons of full age in no other sale than one for immovables, in which is included whatever is immovable by destination."

155. 138 La. 1049, 71 So. 153 (1916).



the article to which we have referred. Nor do we think it can be said to have been out of all proportion to the value of the 'thing' for which it was paid, according to the standard established by the illustration contained in that article. . . ."<sup>156</sup>

At least in one case, however, the court was of the opinion that the vileness of the price is not sufficient to declare a sale void. In *Howe v. Powell*<sup>157</sup> the court stated, by way of dictum:

"The record shows that the price of the sale was \$460; that possession was never delivered to Kleinert, but continued in Cochran, and since 1878 has been in the defendants; and the admission is that the value of the property exceeds \$2500. The price is about one sixth of the value. *It is a vile price. Had the sale been a real one in the intention of the parties, the vendors would have had the right to demand its rescission for lesion beyond moiety.* . . ."<sup>158</sup>

Nevertheless, it must be noted that though the above statement was dictum, it had a strong bearing on the outcome of the case since the decision rested on the rule that a redeemable sale for *an inadequate consideration* and unaccompanied by delivery of the thing sold, is treated as a security contract, unless otherwise proved.

It is submitted, therefore, that whatever be the status of the "serious consideration doctrine" as applied to other contracts, it certainly should have no application to the contract of sale.<sup>159</sup> If the price is vile, that is, much inferior to the value of the thing, the vendor has his remedy under the provisions of Articles 1860-1863, and then only within the limits provided for by those and other articles on the same subject matter.<sup>160</sup>

It might be argued that, following the minority of the French authorities, the redactors intended to adopt the view that the price must also be the equivalent of the thing sold; but, as has been seen, it is doubtful that such was their intention in view of the existence of our articles on lesion.

A compromise might be suggested whereby an *equivalent*

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156. 138 La. 1049, 1070, 71 So. 153, 160 (1916).

157. 40 La. Ann. 307, 4 So. 450 (1888). See also *Rudolph v. Gerdy*, 121 La. 477, 46 So. 589 (1908) (sale for an annuity less than the revenues of the property sold; held in accordance with majority of French commentators that the price was serious and not derisive).

158. *Howe v. Powell*, 40 La. Ann. 307, 310, 4 So. 450, 451 (1888).

159. See *Snellings, Cause and Consideration in Louisiana* (1934) 8 Tulane L. Rev. 178, 206 et seq.

160. See also Arts. 2589-2600, 1869-1871, 1876-1880, 2222, 2566, La. Civil Code of 1870.

would be required in cases to which the action for lesion is inapplicable, but this would be straining the construction of Article 2464 which governs *all* contracts of sale, whether affecting movable or immovable property.

#### CONCLUSION

It is clear that more importance should be attached to the question of determining the true nature of contracts for the transfer of property, not only from the point of view of the formalities and the capacity of the parties, but also, and more particularly, from the point of view of the risk involved in each transaction; and that more emphasis should be placed upon the money requirement for the validity of a contract of sale.

Although the strict requirement as to price certainty would seem to restrict the sale transaction so as to render it ineffective for all the needs of modern business to transfer the property in goods and merchandise, it is submitted that the codal articles of the Louisiana law of sale are sufficiently broad to include any modern devices regarding the fixing of the price, provided that the final determination thereof is not left to depend upon the whim or caprice of one of the parties.

It is also to be noted that the requirement as to the adequateness of the consideration, as announced in *Murray v. Barnhart*,<sup>161</sup> should have no application to a sale contract and that the exclusive criterion as to the seriousness of the price should be the intention of the parties.

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161. 117 La. 1023, 42 So. 489 (1906).